Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

82-1123

No.

IN THE

Supreme Court of the United States

October Term, 1983

EFREM LABOKE, *Et Al.*

Petitioners,

vs.

ALLEN LOWDERMILK, *Et Al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

I. WHETHER A FEDERAL DISTRICT COURT IS DUTY BOUND TO FOLLOW CONFLICTING STATE STATUTES OF LIMITATIONS WHICH BEAR NO UNIFORMITY AS TO TIME LIMITATIONS WITHIN WHICH SUITS MUST BE BROUGHT?

II. WHETHER *ERIE RAILROAD CO. V. TOMPKINS* SHOULD BE OVERRULED, OR REFINED, IN IT'S APPLICATION TO STATE STATUTES OF LIMITATIONS?

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"55-2-12. PERSONAL ACTIONS NOT OTHERWISE PROVIDED FOR.

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued if it be for damages to property. (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any

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other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. (Code 1840, c. 149, 11; Code 1860 c. 149 11, Code 1868. c. 104 12; 1882. c. 102, 12; Code 1923, c. 104, 12; 1949, c. 2; 1959, c. 2).

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IN THE

Supreme Court of the United States

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No.

EFREM LABOKE, *Et Al.*

Petitioners,

vs.

ALLEN LOWDERMILK, *Et Al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Efrem and Eunice Laboke, petition this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

1. On August 31, 1981, the United States District Court for the Southern District of West Virginia, entered a Memorandum Order and Judgment dismissing Petitioners Complaint, and all counts therein, upon the ground that the actions were barred by the West Virginia State Statute of Limitations. *Appendix A and B.*

2. Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. On November 4, 1982, the Fourth Circuit Court of Appeals affirmed the District Court's Judgment and Order. *Appendix C.*

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. 1234 (1).*

CONSTITUTIONAL PROVISION INVOLVED.

14th Amendment, U.S. Constitution.

STATE STATUTE INVOLVED

W. Va., Code 55-2-12.

FEDERAL RULES INVOLVED

Rule 12 (b). F.R. Civ. P.
Rule 56, F.R. Civ. P.

STATEMENT OF THE CASE

The male Petitioner is a Citizen of Uganda, East Africa. On the date of the occurrences, Petitioner was a student at Fairmont State College.

Petitioners filed an action in the United States District Court seeking damages due to multiple tort violations and civil rights violations. In that action, the Petitioners named as defendants; Allen Lowdermilk and Allen Mark Lowdermilk, Sr., (both operators of an Interstate Carrier

Station), Greyhound Lines, Incorporated, and Western Union Telegram and Telegraph Company, Incorporated.

Answers were filed to the Company by each Defendant/Respondents. After the case was put to issue, the Respondents filed Motions to Dismiss under *Rule 12(b), F.R. Civ. P.* contending that the Petitioners had failed to state a claim. Respondents did not raise a Motion for Summary Judgment under *Rule 56, F.R. Civ. P.* Petitioners filed Oppositions to the Motions to Dismiss. In support of their Oppositions to the Motions to Dismiss, Petitioners referred the Court to the Transcript of a State Trial held in the Magistrate's Court of Marion County, West Virginia. That Trial ended on December 6, 1979, with a Jury Verdict of Acquittal favorable to the male Petitioner in the pending action who was then a Defendant in the State Court action.

The Motions and Oppositions came on to be heard before the District Court on July 27, 1981.

On August 21, 1981, the District Court granted the Respondents' Motions to Dismiss. In a footnote to the Court's Memorandum Order, reference was made to *Rule 12(b), F.R. Civ. P.* and *2A Moore's Federal Practice, #12.10,* which restate the rule that a party may raise the defense of limitations by means of *Rule 12(b), F.R. Civ. P. (Appendix A and B).*

Within the time allowed for noting an appeal, Petitioners filed a Notice of Appeal to the Fourth Circuit Court of Appeals.

On November 4, 1982, the United States Court of Appeals for the Fourth Circuit entered an Unpublished Per Curiam Order affirming the District Court's Judgment. *(Appendix C).*

STATEMENT OF FACTS

The male Petitioner is an adult citizen of Uganda, East Africa. Female Petitioner is a citizen of the United States. At the time of the occurrences, male appellant was a part-time student enrolled in Fairmont State College and was a full-time student at the University of West Virginia.

On or about April 1, 1979, the wife of male Petitioner, a Licensed Practical Nurse, residing in Washington, D.C., had wired a sum of money to him via Western Union. The office was located in a building which housed the Greyhound Bus Terminal and a Western Union Telegraph Office. Both businesses were operated by the Lowdermilks (father and son). Petitioner appeared at the offices to receive the money order, via Western Union. An argument ended in an attack upon petitioner by the Respondent, Lowdermilk. As a result of this attack, Petitioner sustained permanent eye injuries, facial injuries, humiliation and other sequalae and was charged with criminal assault. Respondent, Lowdermilk filed a Criminal Charge against the injured Petitioner charging him with Assault and Battery.

Petitioner was brought to Trial before the Magistrate's Court of Marion County, West Virginia on December 6, 1979, in a Trial by Jury. After completion of all evidence and testimony, the Jury returned a verdict of Acquittal exonerating the Petitioner from Criminal liability.

On May 15, 1981, Petitioner filed a Complaint in the United States District Court seeking damages, in eight (8) counts. Count I alleged violation of civil rights; Count II alleged damages due to assault and battery; Count III alleged damages due to malicious prosecution; Count IV alleged damages due to breach of implied contract in fact; Count V alleged damages due to breach of implied

covenants of good faith and fair dealings; Count VI alleged damages due to Outrage; Count VII alleged damages due to negligence; and Count VIII alleged damages due to loss of consortium.

Respondents filed answers to the Complaint. Those Answers were followed with Motions to Dismiss due to Statute of Limitations. Over opposition by Petitioners, the District Court granted an Order dismissing all Counts upon the grounds that upon the face of the Complaint, the action was barred under the Statute of Limitations. It was from that Order that Petitioners filed a Notice of Appeal to the Fourth Circuit Court of Appeals.

On November 4, 1982, the Fourth Circuit Court of Appeals affirmed the District Court's Judgment and Order. *Appendix C.*

SUMMARY OF ARGUMENT

I. A Federal District Court is not duty bound to follow conflicting state statute of limitations which bear no uniformity as to the time limitations within which actions must be brought.

II. Conflicting Federal Court decisions dealing with the various State Statute of Limitations have resulted due to interpretations of *Erie Railroad Co. v. Tompkins.* Accordingly, *Erie Railroad Co. v. Tompkins* must be overruled or refined in it's application in cases where the defense of Statute of Limitations is raised. In other words, Federal District Courts are not bound to follow the procedural laws of the State in which the Courts sit since Statute of Limitations are procedural rather than substantive.

REASONS FOR GRANTING THE WRIT

Petitioners contend that the Petition for a Writ of Certiorari should be granted for the reasons that the Fourth Circuit Court of Appeals has rendered a decision in the pending cause which is in conflict with base-line legal distinctions classifying statute of limitations as being substantive rather than procedural. As a result of this time-worn erroneous classification, various Federal Courts, and Courts of Appeals, have issued decisions which conflict with the correct law in light of the historical purpose of various statutes of limitations which is uniform in its purpose but illogical in results. The conflict is so deeply entrenched in previous decisions so as to call for this Court's exercise of the power of supervision and a clear direction of uniformity.

(I)

FEDERAL DISTRICT COURTS ARE NOT DUTY BOUND TO FOLLOW STATE STATUTES OF LIMITATIONS WHICH BEAR NO UNIFORMITY AS TO THE TIME WITHIN WHICH ACTIONS MUST BE BROUGHT.

The West Virginia Legislature enacted a limitations of action period assigning varying time limits within which various civil actions must be brought. The conflicting time limits within which actions must be brought, in accordance with various statue statutes, are woefully conflicting and has resulted in a maze of conflicting Federal Court decisions. The traditional purpose of statutes of limitations is to protect the defendant from stale claims, old evidence, and lax plaintiffs. *Barnes v. Sears, Roebuck & Co. 406 F. 2d 859, 862 (4th Cir., 1969).* These statutes of limitations periods are designed to protect defendants, not plaintiffs, in that they place an illogical restriction upon

plaintiffs, as to the time within which they must file civil actions. More importantly, however, is the fact that statute of limitations vary among jurisdictions in which Federal Courts sit thereby creating unjust results and denials of procedural due process of law or, in simplified terms, deny access to the Federal Courts. *4 Am Jur. Trials 600-01; 63 Harv. L. Rev. 1177, 1200-05 (1950).* In *Urie v. Thompson, 337 U.S. 163 (1949),* this Court adopted, with approval, a discovery rule in determining when a statute of limitations would begin to run. However, the Court restricted the discovery rule to occupational disease cases and did not express an expansion of the rule to cover all torts. In pure federal causes of action (those created by federal statute), the Limitations period seem uniform.

In Petitioners Complaint, Eight (8) different causes of action were pleaded among which included a complaint for violation of Civil Rights of a Foreign Citizen having presence in the United States. The Statute of Limitations for the State of West Virginia did not cover some of the theories of causes of action. To the extent that Federal causes of action were alleged, the judicial obligation to make a clear distinction or classification of the Statute of Limitations raised serious constitutional questions. If the choice was rationally capable of classification in order to determine whether the statute was procedural or substantive, then the choice should have been made rather than the Court's illusion to an "unguided Erie choice".

(II)

ERIE RAILROAD CO. v. TOMPKINS SHOULD BE OVERRRULED, OR REFINED, IN IT'S APPLICATION TO STATE STATUTES OF LIMITATIONS.

Under *Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)*, this Court held that a Federal District Court in non-federal matter is required to follow the substantive law of the state in which it is sitting, whether statutory or common law. After *Erie Railroad Co. v. Tompkins, supra,* was decided, Federal Courts ruled that questions regarding tort actions and the time within which suits must be brought were determined by various state statutes of limitations. Whether *Erie, supra,* is applicable depends upon a clear isolation or classification of statutes of limitations being either (a) procedural, or (b) substantive. If the classification projects substantive definitions, then *Erie, supra,* does not present a conflict. Logically, the Courts cannot continue to assume that the Statute of Limitations merely destroys the remedy but not the right for if there is no remedy there is no right in terms of access to a Federal Court. A destruction of the remedy is the beginning and the end of the right to sue. If the remedy is destroyed, it is clearly procedural in nature. See *Pleading the Statute of Limitations, 36 Yale L. J. 914 (1927); Some Procedural Aspects of the Statute of Limitations, 27 Cal. L. Rev. 157 (1927).* More importantly however is the fact that this Court has ruled that Federal law, in the form of the Federal Rules of Civil Procedure, rather than State Law, is applied on the specific issue of when the cause of action commences. *Cope v. Anderson, 331 U.S. 461, 67 S. Ct. 1340 (1947).* Where a state cause of action is filed in a Federal Court, *Rule 4(d) (1)* of the Federal Rules of Civil Procedure, rather than state law, applies in determining when an action was commenced. *Hanna v. Plummer, 380*

U.S. 460, 85 S. Ct. 1136 (1965). In *Hanna, supra,* the Court reasoned that:

> "The line between the 'substance' and 'procedure' shifts as the legal context changes. Each implies different variables depending upon the particular problem for which it is used. Cf. *Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 160 ALR 1231*".

Lack of uniform rules or guidelines to determine when a statute of limitations is procedural or when it is substantive creates havoc among decisions on similar questions throughout the Federal Circuits. Thus, *Erie, supra,* merely created a general rule of procedure but did not refine it's impact as distinction and form. That is to say – state statutes of limitations are clearly procedural in that they destroy remedies. With the power to destroy the remedy goes with it the power to destroy the right. A destruction of rights is clearly a substantive constitutional question which the Court should address and resolve.

CONCLUSION

In view of the foregoing points and authorities, the conclusion is inescapable that this Petition presents a case in which the conflicting decisions in important questions of constitutional law should be reversed.

Respectfully Submitted

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Certiorari was mailed, postage prepaid, to Edward W. Eardley, Esquire, Steptoe & Johnson, Post Office Box 1588, Charleston, West Virginia 25326 and to Ralph C. Dusic, Esquire, Post Office Box 3545, Charleston, West Virginia 25334, this ____ day of January, 1983.

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ATTORNEY FOR PETITIONERS

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

EFREM LABOKE and
EUNICE LABOKE,

Plaintiffs,

v. Civil Action
No. 81-2168

ALLEN LOWDERMILK,
ALLEN MARK LOWDERMILK,
GREYHOUND LINES, INCORPORATED,
a corporation, and
WESTERN UNION TELEGRAM AND
TELEGRAPH COMPANY, INC.,
a corporation,

Defendants.

ENTERED
AUG 3 1981
___ORDER BOOK
NO ___ PAGE ___

MEMORANDUM ORDER

Plaintiffs filed this action on May 15, 1981, alleging eight causes of action resulting from a confrontation at the Fairmont, West Virginia Greyhound bus station. The case is presently pending before the Court on defendants' motions to dismiss. Defendants assert that this action should be dismissed for failure to file within the appropriate statutes of limitation.[1]

[1]A party may raise the defense of limitations by means of 12(b) of the Federal Rules of Civil Procedure. See 2A Moore's Federal Practice, §5 *12.10.*

For the purposes of this motion, the following facts alleged in the complaint will be accepted as true:

On or about April 1, 1979, around 1:45 p.m., plaintiff, Efrem Laboke, appeared at the Western Union Telegraph office located in the Fairmont Greyhound bus station to receive a money-gram. When plaintiff requested the money-gram, he was attacked by Allen Mark Lowdermilk, an employee of Greyhound and Western Union. As a result of the altercation, Efrem Laboke was arrested and tried before a jury in Magistrate court in Marion County. On December 6, 1979, the plaintiff was acquitted of the charge of battery.

It is well settled that federal courts should apply appropriate state statutes of limitation when Congress has not provided otherwise. *Johnson v. Davis,* 582 F.2d 1316 (4th Cir. 1978). The appropriate West Virginia statute is found in 55-2-12 of the West Virginia Code.

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that in case a party die, it could not have been brought at common law by or against his personal representative.

The event giving rise to plaintiffs' claims of a civil rights violation, assault and battery, breach of contract, tort of outrage, negligence, and loss of consortium, occurred on April 1, 1979. The claims for malicious prosecution and

libel and slander apparently accrued on December 6, 1979, when plaintiff, Efrem Laboke, was acquitted in Magistrate court of Marion County.

After careful consideration of the issues presented by the motions, the Court hereby finds the following:

1. Count I of the complaint alleging civil rights violations is barred by West Virginia's two-year statute of limitation. See *Cox v. Stanton,* 529 F.2d 47 (4th Cir. 1975).

2. Count II, based on allegations of malicious prosecution, is barred by West Virginia's one-year statute of limitation. See *Cavendish v. Moffit,* 253 S.E. 2d 558 (W. Va. 1979).

3. Count III, for damages due to an assault and battery, is barred by West Virginia's two-year statute of limitations.

4. Count IV charging defendants with libel and slander is barred by West Virginia's one-year statute of limitations. See, *Cavendish,* supra.

5. Count V alleges breach of the contract for faithful performance of the services in delivering the money represented by the money-gram ultimately resulting in personal injuries perpetrated by the tort. Such allegation, however, stems from common law pleading once proper under West Virginia law. It sounds in tort and allegedly having resulted in personal injury is barred by West Virginia's two-year statute of limitations. See, *Maynard, v. General Electric Company,* 486 F.2d 538 (4th Cir. 1973).

6. Count VI, based on the tort of outrage, is not a recognizable cause of action in West Virginia.

7. Count VII, a negligence claim, is barred by West Virginia's two-year statute of limitations.

8. Count VIII, loss of consortium, is barred by West Virginia's two-year statute of limitations.

For the above-stated reasons, it is hereby ORDERED that defendants' motions to dismiss be granted and this action dismissed and stricken from the court's docket.

The Clerk is directed to send certified copies of this Memorandum Order to all counsel of record.

ENTER: August 31, 1981

DENNIS R. KNAPP, CHIEF JUDGE

A TRUE COPY, Certified this
1st day of Sep, 1981
RONALD D. LAWSON, CLERK
BY /s/_____
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

EFREM LABOKE and
EUNICE LABOKE,

Plaintiffs,

v. Civil Action
No. 81-2168

ALLEN LOWDERMILK,
ALLEN MARK LOWDERMILK,
GREYHOUND LINES, INCORPORATED,
a corporation, and
WESTERN UNION TELEGRAM AND
TELEGRAPH COMPANY, INC.,
a corporation,

Defendants.

JUDGMENT ORDER

In conformity with its Memorandum Order entered this date, the court

ORDERS that (1) Defendants' Motions to Dismiss be granted; and

that (2) this action be dismissed and stricken from the court's docket.

ENTER: August 31, 1981

DENNIS R. KNAPP, CHIEF JUDGE

A TRUE COPY, Certified this
31 day of Aug, 1981
RONALD D. LAWSON, CLERK
BY /s/_____
DEPUTY

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

EFREM LABOKE and
EUNICE LABOKE,

Plaintiffs,

v. Civil Action
No. 81-2168

ALLEN LOWDERMILK,
ALLEN MARK LOWDERMILK,
GREYHOUND LINES, INCORPORATED,
a corporation, and
WESTERN UNION TELEGRAM AND TELEGRAPH COMPANY, INC.,
a corporation,

Defendants.

ENTERED
AUG 31 1981
Civil ORDER
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JUDGMENT ORDER

In conformity with its Memorandum Order entered this date, the court

ORDERS that (1) Defendants' Motions to Dismiss be granted; and

that (2) this action be dismissed and stricken from the court's docket.

ENTER:

/s/

DENNIS R. KNAPP, CHIEF JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1941

Efrem Laboke and Eunice Laboke,

Appellants,

versus

Allen Loudermilk; Allen Mark Loudermilk; Greyhound Lines, Incorporated; Western Union Telegram and Telegraph Company, Inc.,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

Argued September 13, 1982 Decided November 4, 1982

Before SPROUSE and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Clement Theodore Cooper (William W. Pepper on brief) for Appellants; Edward W. Eardley (Steptoe & Johnson; John S. Haight; Ralph C. Dusic on brief) for Appellees.

PER CURIAM:

The plaintiff brought this action seeking damages arising out of a physical assault that occurred on April 1, 1979, and out of a criminal prosecution that ended by acquittal on December 6, 1979. The district judge granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b), finding that the plaintiff's complaint on its face showed his action to be time-barred.

We affirm.

The statute of limitations defense may appropriately be raised by motion under Rule 12(b)(6). *See* 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 12.10, at 2314, 3d Ed. (1982). The parties do not dispute that the applicable limitations are set forth in West Virginia Code § 55-2-12(b) (two year period for personal injury claims) and *id.* § 55-2-12(c) (one year for other matters not actionable by personal representative if party dies). It appears on the face of the complaint that the brawl which plaintiff claims resulted in his personal injuries occurred more than two years before the bringing of this suit on May 15, 1981, and that the criminal prosecution alleged to have been malicious and defamatory occurred more than one year before. There appearing on the face of the complaint no disputed issues of fact with respect to the applicable limitation periods, the district judge properly found all claims to be time-barred.

AFFIRMED.